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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-924

FAGAN DICKSON

Petitioner

vs.

GERALD FORD, President of the United States of America, and ELMER STAATS, Comptroller of the United States

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Fagan Dickson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the Court of Appeals is not yet reported, but it is printed in the appendix, along with the order of dissolution of the three-judge court, the judgment of the Circuit Court and the opinion of the District Court. The opinion of the three-judge Federal Court is reported in Dickson vs. Nixon, W.D. Tex 1974, 379 F Supp. 1345. The opinion of this honorable Court ordering cancellation of the judgment of the three-judge Court is reported in Dickson vs. Ford, 1974, 419 U.S. 1085.

Jurisdiction

The Judgment of the Court of Appeals for the Fifth Circuit was entered on October 20, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

I. Whether in a conflict between the powers granted the Congress and the President in Articles I and II of the Constitution, on the one hand, and the power granted the Judiciary in Article III and the Establishment Clause, on the other, the Judiciary should enforce the mandatory language of the Establishment Clause when the effect may be to require the President and the Congress to conduct foreign affairs within the framework of the Constitution. Kilbourn vs. Thompson (1881) 103 U.S. 168.

II. Whether the Judiciary Department is secondary to the Legislative and Executive Departments and must deny jurisdiction when the enforcement of an individual's rights not to be taxed to support an Establishment of Religion will limit the Congress and the President in their power to conduct foreign affairs according to a previously announced policy.

III. Whether Congress may make a law respecting an Establishment of Religion when the Establishment is located outside of the United States.

IV. Whether the nonjusticiability doctrine is available to this Court when a mandatory provision of the Constitution is involved.

Statutory Provisions Involved

Constitutional and statutory provisions involved:
U.S.C.A. Const. Amend. 1
U.S.C.A. Const. Art. I, II and III, Sec. 1 et seq.
Emergency Assistance Act of 1973, 87 Stat. 836.
Foreign Assistance Act of 1974, Sec. 18, 45(a)(7), 88 Stat. 1795.
28 U.S.C. Sec. 1254(1)

Statement of the Case

The Petitioner filed suit on February 8, 1974 in the U.S. District Court for the Western District of Texas, Austin Division, against the President and the Comptroller of Public Accounts for a Declaratory Judgment, Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, request that a three-judge court be impanelled and for general relief.

The Petitioner brought suit as a tax payer and for all other tax payers similarly situated to challenge the constitutionality of the Emergency Assistance Act of 1973, which authorized emergency military assistance or foreign military sales credits, or both, to Israel. The contention was that the grants were prohibited by the Establishment Clause of the First Amendment.

The sworn complaint alleged, among other things, that "The state created by the Jewish people in 1948 was immediately merged with the World Zionist organization and now constitutes the 'Jewish People' national entity. The state of Israel was created by and is an instrument of the larger entity known as the 'Jewish People.' As the present governing force in Israel, the Jewish People constitute 'an Establishment of Religion' within the meaning of the First Amendment."

The courts below have conceded, for the purposes of this case, that the allegations of the complaint are true. All courts below dismissed the complaint, but the Fifth Circuit Court of Appeals has narrowed the grounds of dismissal to one of "nonjusticiability."

Motion To Use Record in Earlier Case

The Petitioner requests that the file in Dickson vs. Ford, No. 74-67, October Term, 1974, in this Court be examined along with the transcript sent up from below in passing on this petition.

Reasons for Granting the Writ

I. THE JUDGMENT BELOW, IF ALLOWED TO STAND, WILL CHANGE THE UNITED STATES FROM A SECULAR GOVERNMENT TO A RELIGIOUS STATE.

The question presented in this case is not the correctness of a political policy for the Middle East. That is a matter that this Court is not required to decide. The question presented here is of far greater importance to this nation. It is basically whether or not this government shall cease to be a secular power and engage instead in "excessive entanglements with religion." [The Nyquist case]

There is no pillar of our democracy more basic than the separation of church and state. There is no constitutional principle that this Court has more consistently upheld. Since the Everson case in 1947, there has never been any doubt as to where this honorable Court stood on the question of whether or not citizens of this country could be taxed to support a religion. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or what form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state,'" 330 U.S. 1, per Mr. Justice Black. In the dissenting opinion Mr. Justice Rutledge, joined by Mr. Justice Frankfurter and Mr. Justice Burton, said:

> "It (Establishment Clause) was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support of religion." p. 32.

In Epperson vs. Arkansas, a unanimous opinion, this Court said:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. . . ." 1968, 393 U.S. 97, pp. 103, 104, per Mr. Justice Fortas.

II. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This is not an isolated instance which is not likely to reoccur. The same question of the establishment of religion being outside the United States could arise if Italy adopts Communism and then moves to take over the State of the Vatican. The State of the Vatican is a nation-state and is recognized by more countries than recognize Israel. If Congress can make laws respecting nation-states that are also establishments of religion, it can do indirectly what this Court has consistently held it could not accomplish by direct appropriations to religious establishments in this country.

III. THE DECISION OF THE CIRCUIT COURT FAILS TO FOLLOW THE LINE OF CASES OF THIS COURT WHICH GIVES PRECEDENCE TO THE GUARANTEES OF THE FIRST AMENDMENT OVER GENERAL PROVISIONS OF THE CONSTITUTION.

This Court has consistently held that where the First Amendment comes in conflict with other provisions of the Constitution, the individual's rights under the First Amendment take precedence.

Tenth Amendment vs. the First Amendment: Thomas vs. Collins, Tex. 1945, 323 U.S. 516 holds that the guarantee of free speech and assembly takes precedence over a state's police power.

Tenth Amendment vs. the First Amendment: Epperson vs. Arkansas, 1968, 393 U.S. 97 holds that the Establishment

Clause takes precedence over a state's power to provide for the general welfare.

Article I, Sec. 8 vs. the First Amendment; Flast vs. Cohen, 1968, 392 U.S. 83 holds that the Establishment Clause takes precedence over Congress' power to provide for the general welfare.

Article II vs. the First Amendment; New York Times vs. United States, 1971, 403 U.S. 713 holds that freedom of the press takes precedence over the President's power to protect the security of the United States.

IV. THE DOCTRINE OF NONJUSTICIABILITY RELIED ON BY THE CIRCUIT COURT WOULD SEEM TO BE TOTALLY INAPPROPRIATE AND UNAVAILABLE AS A JUDGE-MADE RULE OF JUDICIAL CONDUCT WHERE THE QUESTION INVOLVED AS HERE IS A MANDATORY PROVISION OF THE CONSTITUTION. FLAST VS. COHEN, 1968, 392 U.S. 83, 97. THIS ASPECT OF THE DECISION OF THE CIRCUIT COURT PLACES IT IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN THE NEW YORK TIMES VS. UNITED STATES, 1971, 403 U.S. 713.

Conclusion

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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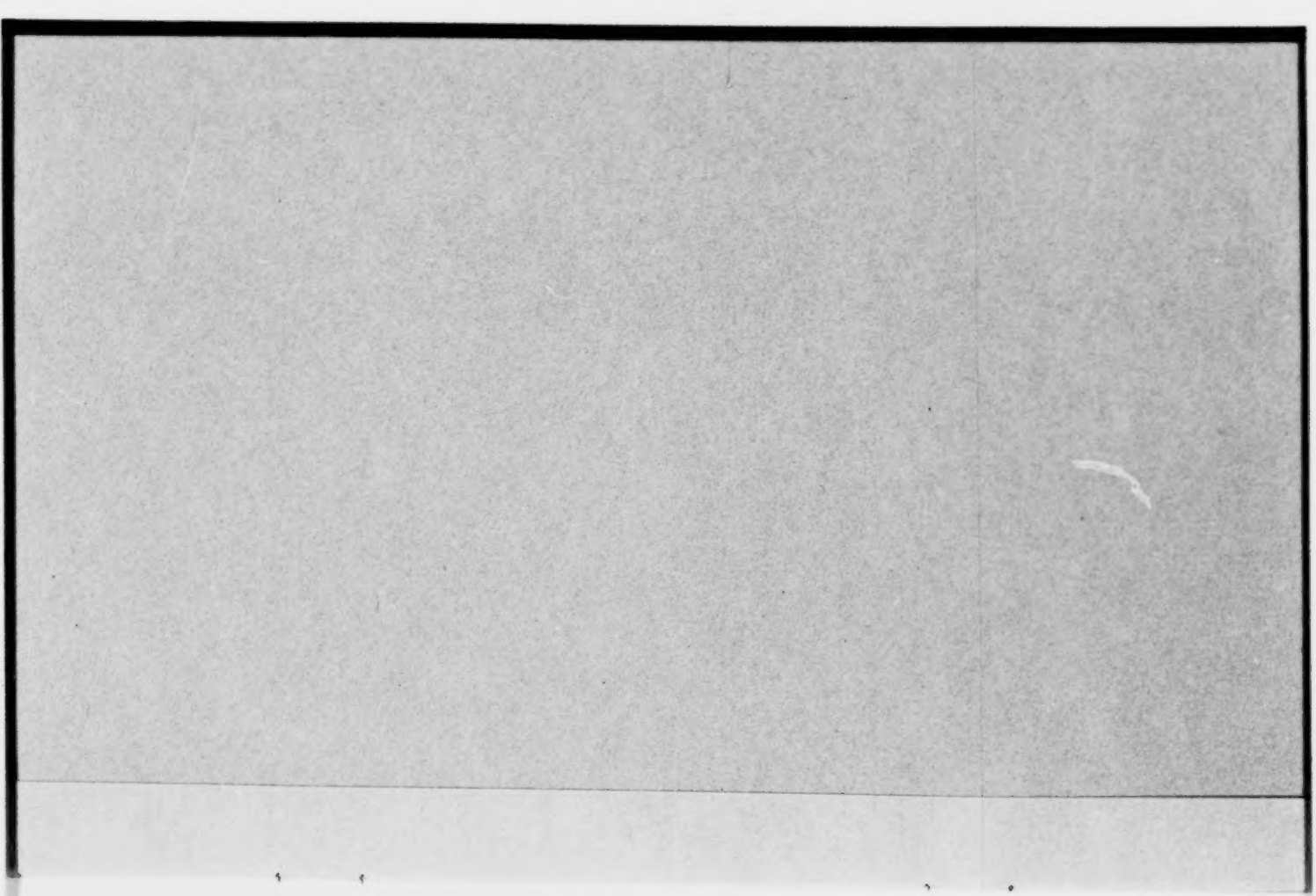
Austin, Texas 78703
Attorney for Petitioner

APPENDIX



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FAGAN DICKSON	◊	
V.	◊	CIVIL ACTION
	◊	No. A-74-CA-46
GERALD R. FORD and ELMER STAATS	◊	

ORDER OF DISSOLUTION

This cause has been remanded to this Court by the Supreme Court of the United States for entry of a fresh order from which a timely appeal might be taken to the United States Court of Appeals. In its previous Memorandum Opinion and Order dismissing Plaintiff's Complaint this Court found that Plaintiff lacked standing to maintain this suit and that the issue presented is a nonjusticiable political question. The Supreme Court determined that appeal from this Court's order of dismissal did not lie under 28 U.S.C. § 1253. A determination of nonjusticiability is properly made by a single district judge. *Gonzalez v. Automatic Employees Credit Union*, –U.S.–(Dec. 10, 1974). The Court being of the opinion that the question presented is nonjusticiable, it is accordingly.

ORDERED, ADJUDGED and DECREED that the three-judge court heretofore convened pursuant to 28 U.S.C. § § 2282, 2284 be, and hereby is, DISSOLVED; and that this case be, and hereby is, REMANDED to the convening judge for further proceedings.

Entered the 23rd day of April, 1975.

HOMER THORNBERRY
UNITED STATES CIRCUIT JUDGE

JACK ROBERTS
UNITED STATES DISTRICT JUDGE

JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FAGAN DICKSON	◊	
	◊	
	◊	CIVIL ACTION
V.	◊	NO. A-74-CA-46
	◊	
GERALD R. FORD and	◊	
ELMER STAATS	◊	
	◊	

ORDER OF DISMISSAL

This cause comes before the Court on remand from the Supreme Court of the United States for entry of a fresh order from which a timely appeal might be taken to the United States Court of Appeals. This cause was originally considered and dismissed by a three-judge court convened pursuant to 28 U.S.C. § § 2282, 2284. In its Memorandum Opinion and Order of May 24, 1974, the Court found that Plaintiff lacked standing to maintain this suit and that the issue presented is a nonjusticiable political question. On remand from the Supreme Court, the three-judge court reiterated its determination that the question presented is nonjusticiable and dissolved itself, remanding the case to the convening judge for further proceedings, in accordance with *Gonzalez V. Automatic Employees Credit Union*, –U.S.–(Dec. 10, 1974). The reasons for dismissal of Plaintiff's Complaint have been set forth in the Memorandum Opinion and Order entered by the three-judge court on May 24, 1974, and this Court now adopts the reasoning set out therein as the basis for dismissal.

Plaintiff seeks leave of Court to amend his Complaint to include his challenge to Sections 18 and 45(a)(7) of the Foreign Assistance Act of 1974, Public Law 93-559, and to avoid any question of mootness. The issues presented by the Amended Complaint are identical to those originally raised in Plaintiff's Complaint, and the Amended Complaint fails to raise a

justiciable "case or controversy." Nonetheless, the requested amendment will be permitted to avoid any question of mootness.

The United States Attorney seeks a ruling on his Motion to Appear as Amicus Curiae and for dismissal of this cause as to the President for lack of jurisdiction. As noted in the Court's Memorandum Opinion and Order of May 24, 1974, the issue of the jurisdiction of this Court to hear a suit against the President need not be reached in this case. It is accordingly.

ORDERED, adjudged and DECREED that Plaintiff be, and hereby is, GRANTED leave to amend his Complaint; that the Motion of the United States Attorney for Ruling on Motion to Appear as Amicus Curiae and for dismissal as to the President for lack of jurisdiction be, and hereby is, DENIED; and that Plaintiff's Complaint and Amended Complaint be, and hereby are, DISMISSED for the reasons set out in the Memorandum Opinion and Order entered by the now dissolved three-judge court on May 24, 1974.

Entered the 23rd day of April, 1975, at Austin, Texas.

JACK ROBERTS
UNITED STATES DISTRICT JUDGE

OPINION OF THE CIRCUIT COURT OF APPEALS

DICKSON v. FORD

Fagan DICKSON, Plaintiff-Appellant,

v.

Gerald FORD, President of the United States of America, and Elmer Staats, Comptroller of U.S., Defendants-Appellees.

No. 75-2297
Summary Calendar*

United States Court of Appeals,
Fifth Circuit.

Oct. 20, 1975.

Appeal from the United States District Court for the Western District of Texas.

Before COLEMAN, AINSWORTH and SIMPSON,
Circuit Judges

PER CURIAM:

Appellant, Fagan Dickson, brought suit as a taxpayer, challenging the constitutionality of the Emergency Security Assistance Act of 1973, Pub.Law. 93-199.[1] Dickson's complaint alleged that the State of Israel "was created by and is an instrument of the larger entity known as the 'Jewish People' ", and, hence, grants of foreign assistance by the United States to Israel are prohibited by the Establishment of Religion Clause of the First Amendment to the Constitution.

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

A three-judge court, convened pursuant to Title 28, U.S.C., Sections 2282, 2284, dismissed the complaint on two grounds: (i) Dickson failed to meet the standing requirements enunciated in *Flast v Cohen*, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947, as a taxpayer to maintain the action, and (ii) the cause presented a nonjusticiable "political question". *Dickson v. Nixon*, W.D. Tex. 1974, 379 F.Supp. 1345. Direct appeal of the order of dismissal was taken to the United States Supreme Court, pursuant to Title 28, U.S.C., Section 1253. The Supreme Court on the basis of its holding in *Gonzalez v. Automatic Employees Credit Union*, 1974, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249, vacated the order of the three-judge court, and remanded the case to the district court to enter a "fresh order." *Dickson v. Ford*, 1974, 419 U.S. 1085, 95 S.Ct. 672, 42 L.Ed.2d 677. On remand the three-judge court reiterated its determination that a nonjusticiable issue was presented, dissolved itself, and remanded the case to the convening judge for further proceedings. The convening judge granted Dickson's motion for leave to amend his complaint to include a challenge to Sections 18 and 45(a)(7) of the Foreign Assistance Act of 1974, Pub.Law 93-559, 88 Stat. 1795,[2] so as to avoid any question of mootness, and entered an order of dismissal, adopting the reasoning in the opinion of the three-judge court.

We affirm the dismissal of the action, agreeing with the district court that this cause clearly presents a nonjusticiable political question beyond the jurisdictional limitations imposed upon federal courts by Art. III of the Constitution. We decline to reach the issue of whether as a taxpayer Dickson has satisfied the standing requirements of *Flast v. Cohen*, supra, to challenge these Congressional appropriations.

[1,2] The nonjusticiability of political questions is founded on the doctrine of separation of powers, whether a matter has been committed to another branch of government by the Constitution. *Baker v. Carr*, 1962, 369 U.S. 186, 210, 82 S.Ct. 691, 706, u L.Ed.2d 663, 682. The dominant considerations in reaching a determination that a question falls into the category of political questions have been held to be "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination. . . ." *Coleman v. Miller*, 1939, 307 U.S. 433, 454-455, 59 S.Ct. 972, 982, 83 L.Ed. 1385, 1397; *Baker v. Carr*, supra at 210, 82 S.Ct. at 706, 7 L.Ed.2d at 682. Among the areas which the courts have

traditionally deemed to involve political questions is the conduct of foreign relations, which "is committed by the Constitution to the executive and legislative–'the political'–departments of the government. . . ." *Oetjen v. Central Leather Co.*, 1918, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726, 732. While not every case which concerns foreign relations is beyond judicial determination, a "discriminating analysis" of the particular issues presented in a given controversy is called for. *Baker v. Carr*, supra, at 211-212, 82 S.Ct. at 707, 7 L.Ed.2d at 682.

[3] Appellant's challenge to the constitutionality of the Congressional Acts in question is a challenge to the power of the President and Congress to conduct the foreign affairs of the United States. Both the Congress and the President have determined that military and economic assistance to the State of Israel is necessary at this time to "maintain a balance of forces in the Middle East and [to] maintain Israel's self-defense capacity, in accordance with long-standing national policy of the United States." S.Rep.No.93-657, 93d Cong. 1st Session 3 (1973); 9 Weekly Compilation of Presidential Documents 1291 (Oct. 29, 1973). We hold that a determination of whether foreign aid to Israel is necessary at this particular time is a "question uniquely demand[ing] single-voiced statement of the Government's views," *Baker v. Carr*, supra, at 211, 82 S.Ct. at 707, 7 L.Ed.2d at 682, and a decision "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility. . . ." *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corporation*, 1948, 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568,576.

Our reluctance to affirm the decision of the district court on the ground that appellant has failed to satisfy the second leg of the test enunciated in *Flast v. Cohen*, supra, is caused by the recent decisions of the Supreme Court in *Schlesinger v. Reservists Committee to Stop the War*, 1974, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706, and *United States v. Richardson*, 1974, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678, and by the apparent failure of the court below to distinguish between the Establishment Clause and the Freedom of Religion Clause of the First Amendment. Since we affirm the district court's dismissal of the cause on the alternative ground in that court's opinion that a nonjusticiable political question is presented, we express no view as to the correctness of the district court's opinion on the issue of taxpayer standing.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-2297
Summary Calendar

D. C. Docket No. CA A74-46

FAGAN DICKSON,

Plaintiff-Appellant,

versus

GERALD FORD, President of the United States of America, and ELMER STAATS, Comptroller of U.S.,

Defendants–Appellees.

Appeal from the United States District Court for the Western District of Texas

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

JUDGMENT

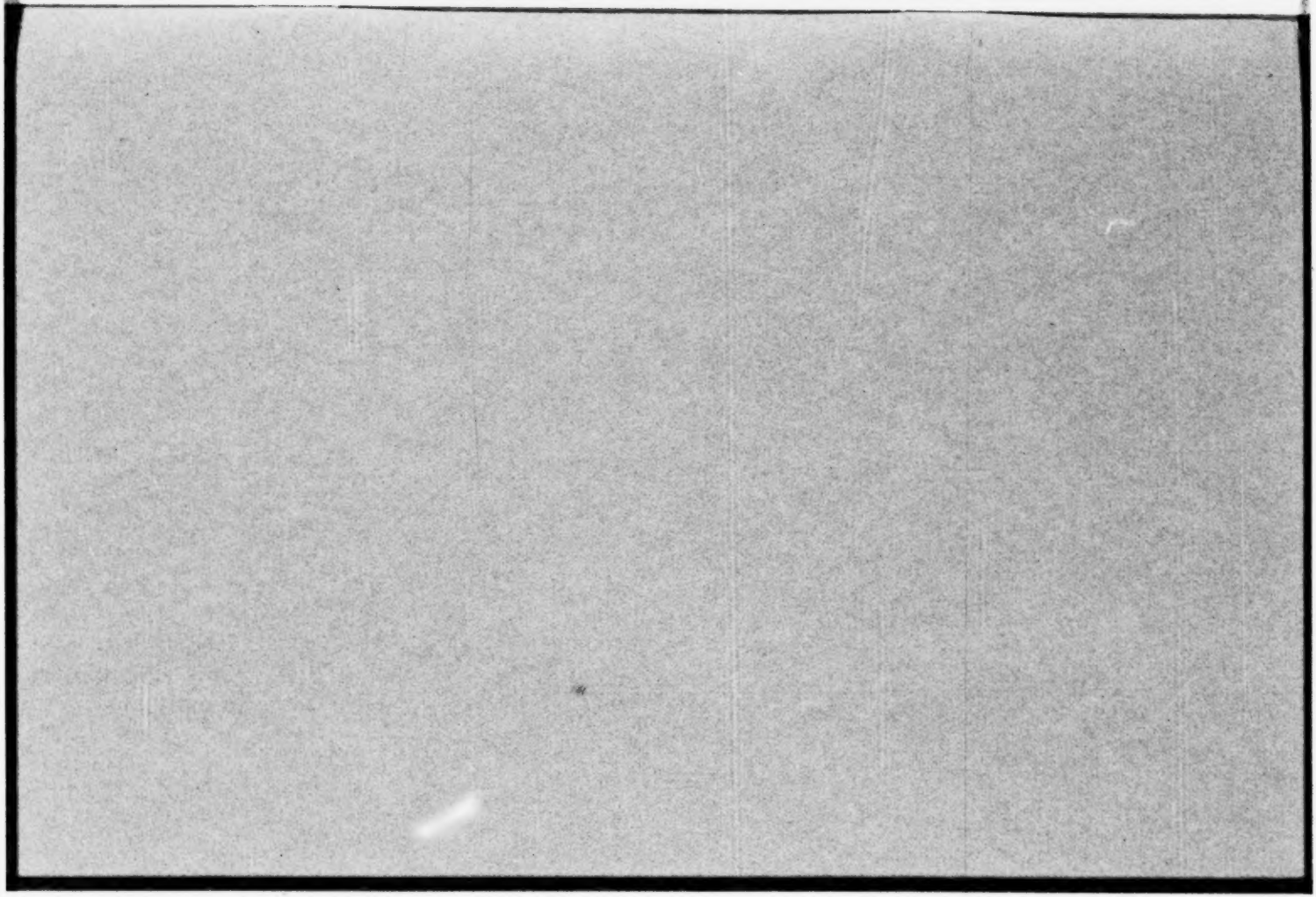
This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and brief on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 20, 1975

Issued as Mandate:



In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-924

FAGAN DICKSON, PETITIONER

v.

GERALD R. FORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this suit in the United States District Court for the Western District of Texas, seeking a declaration that the Emergency Security Assistance Act of 1973, 87 Stat. 836, is unconstitutional. His complaint alleged that the military aid to Israel authorized by the Act violates the First Amendment because "[t]he State of Israel * * * [and] the Jewish people constitute 'an establishment of religion.' "[1] Petitioner sought an injunction against the President and the Comptroller General to prevent them from carrying out provisions of the Act.

A three-judge district court was convened. The district court dismissed the complaint, holding that petitioner lacks standing and that the case presents a nonjusticiable political question. 379 F. Supp. 1345. This Court, citing *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, vacated the order of the three-judge

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[1]Complaint, p. 3.

court and remanded the case to the district court "so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals." 419 U.S. 1085.

On remand the three-judge court dissolved itself (Pet. App. A-1). After granting petitioner's motion for leave to amend his complaint to include a challenge to Sections 18 and 45(a)(7) of the Foreign Assistance Act of 1974, Pub. L. 93-559, 88 Stat. 1800 and 1815, the single-judge district court entered an order of dismissal, adopting the reasoning of the initial opinion of the three-judge court (Pet. App. A-3 to A-4). The Court of appeals affirmed (Pet. App. A-5 to A-7; 521 F.2d 234), holding that petitioner's complaint "clearly present[ed] a nonjusticiable political question beyond the jurisdictional limitations imposed upon federal courts by Art. III of the Constitution" (Pet. App. A-6). The court of appeals declined to reach the question whether petitioner had satisfied the standing requirements of *Flast* v. *Cohen*, 392 U.S. 83.

Petitioner's claims present nonjusticiable questions. The court of appeals correctly recognized that petitioner's complaint is nothing but a challenge to the power of the President and of the Congress to conduct the foreign affairs of the United States. The Emergency Security Assistance Act of 1973 was designed to create a balance of military forces in the Middle East and thus help to end the prevailing hostilities.[2] This case therefore is governed by the well-settled rule that the judiciary should defer to

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[2]As the court of appeals observed, "[b]oth the Congress and the President have determined that military and economic assistance to the State of Israel is necessary at this time to 'maintain a balance of forces in the Middle East and [to] maintain Israel's self-defense capacity, in accordance with long-standing national policy of the United States.' S. Rep. No. 93-657, 93d Cong. 1st Session 3 (1973); 9 Weekly Compilation of Presidential Documents 1291 (Oct. 29, 1973)" (Pet. App. A-7).

the judgment of the political branches of government in the conduct of foreign affairs. As this Court stated in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

See also *Baker* v. *Carr*, 369 U.S. 186, 211; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111. There is no conflict among the circuits and no reason to grant the petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.